

HB / HP

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REUBEN BROWN,	:	
	:	CIVIL ACTION
Petitioner	:	
v.	:	NO. 07-5427
JOHN A. PALAKOVICH, et al,	:	
Respondents	:	

FILED

JUN - 9 2008

MICHAEL E. RONZ, Clerk
By JCH Dep. Clerk

HENRY S. PERKIN
UNITED STATES MAGISTRATE JUDGE

REPORT AND RECOMMENDATION

Presently before the Court is a pro se Petition for Writ of Habeas Corpus filed by the Petitioner, Reuben Brown ("Petitioner"), pursuant to 28 U.S.C. section 2254. The Petitioner is currently incarcerated in the State Correctional Institution located in Dallas, Pennsylvania. For the reasons that follow, it is recommended that the Petition should be denied with prejudice and dismissed without an evidentiary hearing.

I. PROCEDURAL HISTORY ¹

On October 28, 1996, a jury presided over by the Honorable Eugene H. Clarke, Jr. found Petitioner guilty of first-degree murder, two counts of robbery, possession of an instrument of crime, and criminal conspiracy. On October 29, 1996, the jury set the penalty on the murder charge at life imprisonment without

¹ This information is taken from the Petition for Writ of Habeas Corpus, the Response thereto, and the exhibits attached to those pleadings.

6-9-08 mailed to R. Brown e-mailed to T. Dolgenos
S. Atkinson

parole. On January 9, 1997, following receipt of a presentence investigation report, a mental health evaluation, and a hearing, Judge Clarke formally sentenced Petitioner to an term of life in prison with concurrent sentences of five to ten years' imprisonment on each of the robbery and criminal conspiracy bills, and a concurrent sentence of six to sixty months' incarceration on the conviction for possession of an instrument of crime.

Petitioner filed a timely direct appeal from the judgment of sentence in the Superior Court of Pennsylvania. On July 27, 1999, the Superior Court denied Petitioner's direct appeal and affirmed the judgment of sentence. See Response, Ex. A; Commonwealth v. Brown, 742 A.2d 1140 (Pa. Super. 1997)(table). In so doing, the Superior Court concluded that (1) the evidence was sufficient to support the verdict; (2) the trial court did not err in denying the request for a mistrial based on a witness' exercise of his Fifth Amendment privilege; (3) the trial court did not err in instructing the jury on flight; and (4) the prosecutor's closing argument was not unduly prejudicial. See Response, Ex. A; Commonwealth v. Brown, 742 A.2d 1140 (Pa. Super. 1997)(table). On January 5, 2000, the Pennsylvania Supreme Court denied the petition for allowance of appeal. Commonwealth v. Brown, 749 A.2d 465 (Pa. 2000)(table).

On January 27, 2000, Petitioner filed a pro se petition

pursuant to the Pennsylvania Post-Conviction Relief Act ("PCRA"). See 42 Pa. C.S.A. § 9541, et seq. See Response, Ex. B. Petitioner was appointed counsel, who filed an amended petition on July 19, 2000. See Response, Ex. C. The amended petition was based on an affidavit from Commonwealth witness, Terry Butler, who allegedly recanted his testimony. See Response, Ex. C. Although the PCRA court ordered a hearing on the matter, and allowed several continuances, it ultimately dismissed the petition on February 28, 2001, following many failed attempts to locate Mr. Butler. Petitioner appealed the PCRA court's dismissal to the Pennsylvania Superior Court, which determined on April 4, 2003 that the PCRA court properly exercised its discretion by denying any further requests for a continuance, and affirmed the dismissal of the PCRA petition. See Response, Ex. D; Commonwealth v. Brown, 828 A.2d 394 (Pa. Super. 2003)(table). Petitioner did not file a petition for allowance of appeal to the Pennsylvania Supreme Court.

On September 5, 2003, petitioner filed a second pro se PCRA petition. See Response, Exhibit E. The PCRA court, pursuant to Pa.R.Crim.P. 907, advised Petitioner of its intent to dismiss the petition without a hearing on the basis that it was untimely filed and without merit. On June 18, 2004, the PCRA court dismissed the petition as untimely. Petitioner appealed the dismissal to the Pennsylvania Superior Court, which affirmed

the dismissal on December 19, 2006. See Response, Ex. F; Commonwealth v. Brown, 918 A.2d 783 (Pa. Super. 2006)(table). On October 18, 2007, the Pennsylvania Supreme Court denied Petitioner's allocatur petition. Commonwealth v. Brown, 934 A.2d 71 (Pa. 2007)(table).

Petitioner signed the instant Petition for Writ of Habeas Corpus on December 5, 2007, and it was filed with the Clerk of Court on December 21, 2007. Pursuant to the prison mailbox rule, this Court will consider the date of filing as December 5, 2007. Burns v. Morton, 134 F.3d 109, 113 (3d Cir. 1997)(motion is deemed filed on date petitioner gave petition to prison officials to mail).

On February 15, 2008, this case was referred by the Honorable Harvey Bartle, III for preparation of a Report and Recommendation. The Response was filed on June 5, 2008. Respondents contend that the Petition is time-barred, that the principles of equitable tolling do not apply to excuse the untimeliness of the Petition, and that this case should be dismissed with prejudice and without an evidentiary hearing.

II. DISCUSSION

Petitioner's case must be decided pursuant to the terms of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which was enacted April 24, 1996. Pub.L. 104-132, 110 Stat. 1214. Section 104(2) of the AEDPA amended 42 U.S.C.

section 2254, the statute under which this Petition was filed, requires that federal courts give greater deference to a state court's legal determinations. The AEDPA also amended 28 U.S.C. section 2244, to require that a strict one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court.² In this case, the applicable starting point to examine the limitations period is the latest date on which the judgment of sentence became final, either by the conclusion of direct review or the expiration of the time for seeking such review. See 28 U.S.C. § 2244(d)(1).

² 28 U.S.C. section 2244 requires that:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). If direct review of a criminal conviction ended prior to the AEDPA's effective date, a prisoner has one year subsequent to the April 24, 1996 effective date to properly file a habeas action. Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998).

Petitioner's judgment of sentence became final on April 4, 2000, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal and the time for seeking discretionary review with the United States Supreme Court expired. See U.S. Supreme Court Rule 13. Accordingly, the one-year time limit for Petitioner to timely file a federal Petition for Writ of Habeas Corpus began on April 4, 2000. In the absence of any statutory or equitable tolling, Petitioner, therefore, would have been required to file his federal habeas petition on or before April 3, 2001. We note, however, that because the AEDPA's one-year statute of limitations is subject to both statutory and equitable tolling, we must examine whether the instant Petition may be considered timely filed under either concept. 28 U.S.C. § 2244(d) (enumerating statutory tolling provisions); Merritt v. Blaine, 326 F.3d 157, 161 (3d Cir.), cert. denied, 540 U.S. 921 (2003) (holding AEDPA's time limit is subject to the doctrine of equitable tolling, a judicially crafted exception).

A. Statutory Tolling

The limitations period will be statutorily tolled for the time during which a "properly filed" application for state post-conviction or other collateral review is pending. See 28 U.S.C. § 2244(d)(2). However, if a PCRA petition is not timely filed, it is not considered properly filed in order to toll the

AEDPA one-year statutory time period. Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005).

Petitioner's first PCRA petition was filed on January 27, 2000, before the one-year habeas clock began running. On April 4, 2003, the Pennsylvania Superior Court affirmed the dismissal of the PCRA petition. As a result, the statute of limitations in which Petitioner was to file his federal habeas corpus Petition was tolled until May 4, 2003, thirty days after the Pennsylvania Superior Court denied his PCRA petition and the time for filing a petition for allowance of appeal with the Pennsylvania Supreme Court expired. See 28 U.S.C. § 2244(d)(1)(A); Pa. R.A.P. 1113; 42 Pa. C.S.A. § 9545(b)(3). The time for computing the limitations period, therefore, began on May 4, 2003, and remained uninterrupted through May 3, 2004.

Petitioner's second PCRA petition, which was filed on September 5, 2003, did not toll the statutory period because it was not timely filed. See Response, Ex. F; Commonwealth v. Brown, 918 A.2d 783 (Pa. Super. 2006)(table). Untimely PCRA petitions do not toll the one-year statute of limitations pursuant to AEDPA. Pace, 544 U.S. at 417. The present Petition was filed on December 5, 2007, over three years after the period of limitation expired. It is statutorily time-barred.

B. Equitable Tolling.

This Court must next examine whether the AEDPA statute of limitations should be *equitably* tolled. Robinson v. Johnson, 313 F.3d 128, 134 (3d Cir. 2002), cert. denied, 540 U.S. 826 (2003) (citation omitted). The United States Court of Appeals for the Third Circuit has held that equitable tolling is proper "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice." United States v. Midgley, 142 F.3d 174, 179 (3d Cir. 1998) (citation omitted). The Petitioner "must show that he . . . 'exercised reasonable diligence in investigating and bringing [his] claims.' Mere excusable neglect is not sufficient." Miller v. New Jersey State Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998) (quoting New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1126 (3d Cir. 1997) and citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990)).

Courts must be sparing in their use of equitable tolling. Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 239 (3d Cir. 1999). The limitations period will be equitably tolled "only when the principle of equity would make the rigid application of a limitations period unfair." Satterfield v. Johnson, 434 F.3d 185, 195 (3d Cir. 2006); Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). However, if a PCRA petition is untimely, it is not considered properly filed in order to toll

the AEDPA one-year statutory time period. Pace v. DiGuaglielmo, 544 U.S. 408, 417 (2005). For equitable tolling to apply, the Third Circuit has held that the petitioner has the burden to show he "diligently pursued his rights and that some extraordinary circumstance stood in his way." Satterfield, 434 F.3d at 195. The Third Circuit has identified three circumstances in which equitable tolling may apply: "(1) the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum." Id. See also Fahy v. Horn, 240 F.3d 239, 244 (3d Cir.), cert. denied, 534 U.S. 944 (2001) (citing Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted)).

Petitioner does not acknowledge that his instant habeas corpus Petition is untimely, nor does he assert any claims of equitable tolling. Moreover, based on our thorough review of the record in this matter, we conclude that Petitioner did not act in a reasonably diligent fashion because a reasonably diligent petitioner would have acted promptly to preserve his rights not only in the state court, but also in Federal Court. Petitioner fails to allege any steps that he took to timely file his federal habeas petition. None of the circumstances which warrant equitable tolling apply in this case to render the instant Petition timely. Fahy, 240 F.3d at 244. The Petition is time-

barred, and must be denied with prejudice and dismissed without an evidentiary hearing.

C. Certificate of Appealability.

When a district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, a certificate of appealability should issue only if (1) the petition states a valid claim for the denial of a constitutional right, and (2) reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). In this case, reasonable jurists could not disagree that the instant Petition is time-barred. It is statutorily barred, and equitable tolling does not apply to this Petition.

For all of the above reasons, I make the following:

RECOMMENDATION

AND NOW, this 9th day of June, 2008, IT IS
RESPECTFULLY RECOMMENDED that the Petition for Writ of Habeas
Corpus filed pursuant to 28 U.S.C. section 2254 should be DENIED
with prejudice and DISMISSED without an evidentiary hearing.
There is no probable cause to issue a certificate of
appealability.

The Petitioner may file objections to this Report and
Recommendation. See Local Civ. Rule 72.1. Failure to timely
file objections may constitute a waiver of any appellate rights.

BY THE COURT:



HENRY S. PERKIN
United States Magistrate Judge